

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

HONORABLE WALLACE R HOGGATT

CLERK OF THE COURT
C. Smith
Deputy

STATE OF ARIZONA

LIZ BARRICK

v.

BERNABE JIMENEZ (001)

SAJI VETTIYIL

BOB JAMES - CRIMINAL COURT
ADMINISTRATOR
VICTIM SERVICES DIV-CA-CCC
HONORABLE WALLACE R HOGGATT
COCHISE COUNTY SUPERIOR COURT
P O DRAWER CG
BISBEE AZ 85603

IN RE: MOTIONS TO DISQUALIFY THE MARICOPA COUNTY ATTORNEY'S OFFICE
ORDER
IN CASE NUMBERS:

CR2005-034429-004 SE
CR2009-124835-001 SE
CR2009-106172-001 SE
CR2009-030516-001 SE
CR2009-115211-001 SE
CR2009-171658-001 DT
CR2009-168065-001 DT
CR2009-123513-001 SE
CR2005-034429-001 SE
CR2008-007842-001 DT
CR2009-008059-001 DT
CR2009-008075-001 DT
CR2009-169126-001 DT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

CR2009-173800-001 DT
CR2009-153609-001 DT
CR2009-176339-001 DT
CR2009-142340-001 DT
CR2009-007679-003 DT
CR2009-121112-001 DT
CR2008-007521-002 DT
CR2009-163230-001 DT
CR2009-163230-003 DT
CR2009-154846-001 DT
CR2006-007790-001 DT
CR2009-175039-001 DT
CR2009-137382-001 DT
CR2007-120787-001 DT
CR2008-180135-001 DT
CR2004-007442-001 DT
CR2006-048884-001 DT
CR2004-008340-001 DT
CR2008-156564-001 DT
CR2005-030514-001 SE
CR2009-130634-002 DT
CR2009-007438-001 DT
CR2007-106833-001 DT
CR2003-022049-001 DT
CR2004-124662-001 SE
CR2009-122158-001 DT

The State filed a Motion to Vacate Oral Argument and Evidentiary Hearings set for February 02, 2010, and for an Expedited Ruling on All Motions to Disqualify MCAO for an Alleged Conflict of Interest Without Argument; in the Alternative, Motion to Require Parties to Appoint One Attorney to Argue the Issue of Agency Disqualification (referred to herein as “the State’s Motion”) on January 15, 2010. Responses have been received in most of the cases as of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

this date, but not in all. With or without a response, however, the Court will examine each case to determine if any hearings should be held.

The State's Motion does not cite any legal authority for this Court to vacate the oral argument in these cases, but that authority does exist. Rule 35.2, Arizona Rules of Criminal Procedure, states, "Upon request of any party, or on its own initiative, the court may set any motion for hearing. The court may limit or deny oral argument on any motion." The comment to that rule makes clear its purpose:

The hearing and oral argument requirements are intended to give the court maximum discretion in deciding what procedures, in addition to the written motion and memoranda, will be most helpful to it in reaching a reasoned and expeditious decision on each issue. It eliminates either party's absolute right to oral argument on a motion. ...

This Court believes that, similarly, no party has the absolute right to an evidentiary hearing on a motion to disqualify opposing counsel. The question is whether there are contested facts which, if true, would be significant in resolving the motion.

These considerations will control this Court's decision on whether to grant an evidentiary hearing and oral argument – not certain other considerations raised by the State.¹

Each group of cases, arranged according to hearing time currently set on February 02, shall be examined in turn:

¹ In particular, the Maricopa County Attorney's Office urges this Court to vacate the hearings so as to deny "a platform for defense attorneys to make allegations as to the motivations behind the actions of public official." State's Motion at 3. This Court is not in the business of either granting or denying platforms for political purposes. If the defendants are entitled to a public hearing, they will get it, regardless of the political consequences. Similarly, if defendants are not entitled to a public hearing, and if the public hearing would not assist the Court in resolving the pending motions, they will not have a hearing, regardless of the political consequences.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

A. 10:00 a.m. In State v. Moises Mejia, CR2005-034429-004, State v. Sixto Balbuena Jr., CR2009-124835-001, State v. Anthony Quinn Pink, CR2009-106172-001, State v. Dale Navarro, CR2009-030516-001, State v. Claude Winters, CR2009-115211-001, State v. Federico Granados Garcia, CR2009-171658-001, State v. Jose Gabriel Garcia, CR2009-168065-001, State v. Brenton Biggs, CR2009-123513-001, and State v. Carlos Ruben Curiel, CR2005-034429-001 (in which counsel for Mr. Curiel joined in defendant Mejia's motion and filed no other pleading), the posture of the case is the same in each: Following this Court's order of January 13, 2010, each side submitted a prehearing statement disclosing witnesses. The State intends to call no witnesses², except perhaps in rebuttal, and in each of the cases just listed, the defense has stated that no witnesses are anticipated "given time constraints imposed," although no motion to continue has been filed in accordance with this Court's January 13, 2010, order. Thus, no witnesses have been disclosed by either side.

Also in accordance with this Court's January 13 order, the defense has submitted a list of 34 documents it proposes to offer at the hearing and has provided copies to the Court. The State has not listed any documents or other exhibits. With regard to the materials listed by the defense, many of them are of questionable evidentiary value. Some of the more relevant materials have been submitted to this Court numerous times, and will be considered by the Court in making its ruling, such as the criminal complaint against the presiding criminal judge, and the civil RICO complaint against the Board of Supervisors, current and retired judges, and others.

² The State filed the same form of prehearing statement in each case set for hearing by the Court's order of January 13, 2010.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

And of course this Court can (and does) take judicial notice of the turmoil currently existing in Maricopa County. In any event, the State has not contested the facts demonstrating such turmoil, arguing rather the significance of those facts.

Therefore, based on the foregoing review, there is no need for an evidentiary hearing, since there is no evidence to be presented. Further, there is no need for oral argument. This Court has received and read multiple versions of the motions to disqualify, the responses thereto, and supplemental materials. The issue of whether MCAO must be disqualified as counsel for the State in these cases has been more than adequately argued on paper. Oral argument would add nothing.

For the foregoing reasons, the hearings in the cases just discussed, including both evidentiary hearings and oral argument, are VACATED. The requests for evidentiary hearings and argument are DENIED. These motions are taken Under Advisement this date.

In State v. Justin Wade Lunsford, CR2008-007842-001, also set for hearing at 10:00 a.m., the case is in a somewhat different posture. Here, defense counsel filed, in accordance with this Court's order of January 13, a Motion to Continue the hearing, in which defendant disclosed the names of five witnesses whom defendant wishes to present (one by affidavit, the other four by live testimony), as well as documentary evidence. The estimated time for the four live witnesses to testify would be 30 minutes each, for a total of two hours. As it has in all cases set for February 02, the State filed a prehearing statement asserting that it does not intend to call any witnesses, except perhaps in rebuttal.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

The witnesses listed are judicial administrative assistants to Maricopa County judges or commissioners. The same statement has been provided about the substance of the testimony of each witness: “Will testify about after hours home visit of Sheriff’s deputy.” According to defendant’s motion, those visits were “to interrogate [the JAs] about the Court Tower project...” Defendant’s Motion at 5. Other defendants have made similar representations in their motions or other materials. The Court notes that the State’s response does not deny that those visits occurred. Thus, it is not clear whether any of the JAs, whether they testify in person or by affidavit, would contribute to the facts now known to this Court, but it is possible. To ensure a full opportunity for defendant to present facts that may as yet be unknown to the Court, the evidentiary hearing, with an opportunity for argument thereafter, is GRANTED, but it will not occur on February 02, 2010. Defendant’s Motion to Continue is GRANTED. The hearing is hereby SET for **MONDAY, MARCH 01, 2010, AT 10:30 A.M.** The hearing of February 02, 2010, with regard to this case, is VACATED.

B. 11:00 a.m. In each of the cases currently set for hearing at 11:00 a.m. – State v. Matthew Lang, CR2009-008059-001, State v. Donald Murphy, CR2009-008075-001, State v. Jonathan Hartle, CR2009-169126-001, State v. Peter Aguilar, CR2009-173800-001, State v. Met Kosumi, CR2009-153609-001, State v. Allen Wolle, CR2009-176339-001, and State v. Daniel Betzold, CR2009-142340-001 – the posture of the case is the same. In each, after this Court’s order of January 13, 2010, the State filed its prehearing statement, listing no witnesses. In the cases set for 11:00 a.m., defense counsel has filed a response and Motion to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

Continue. Despite the fact that this Court ordered each counsel to state in a prehearing statement “the name and contact information of each witness whom counsel intends to call at the hearing; the substance of each witness’ expected testimony; [and] counsel’s good faith estimate of the amount of time for each witness,” defense counsel in each of these cases has provided the following:

“2. To the extent that defense counsel is able to foresee witnesses, I anticipate calling one or more experts on ethics, an investigator from my office and perhaps 2 to 4 fact witnesses. At this point in time, it is impossible to give any estimate of time needed for witnesses.

3. Defense counsel has not yet assembled the addresses and contact information of prospective witnesses.

4. Defense counsel needs an additional four weeks to interview witnesses and may need additional time if any witnesses declined to be interviewed and the defense is forced to seek a deposition. Similarly, there are third parties who possess evidence which, thus far, they have not surrendered to defense counsel. Defense counsel may need a Court Order for Production and shall seek same soon.”

Defendant’s Consolidated Response to Notice of Hearing and Order and Motion to Continue and Request for Stay of Court Proceedings, filed January 22, 2010, at 2. [Emphasis in original.]

This statement is not in compliance with the Court’s order. Defendant filed his Motion to Disqualify MCAO and Motion to Dismiss on December 21, 2009. The Court notes that in most

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

of these cases – all of them except Kosumi and Wolle – defendants asked not only for an evidentiary hearing with argument, but also for an *expedited* hearing. Presumably they were ready for expedited hearings. The present motions to disqualify demand rulings as soon as reasonably possible. MCAO is entitled to know, as soon as reasonably possible, whether it will keep the cases or give them up. The defendants are entitled to know, as soon as reasonably possible, with what prosecutors they will be dealing. This Court will not grant a continuance based on vague allegations that there may be people who might have something to say if only they were found.

In each of these cases, defendant has also submitted a lengthy list of evidentiary items. That list is considerably longer than the list provided for most of the cases originally set for 10:00 a.m., but the Court believes it has the relevant documents.

For these reasons, the evidentiary hearings with oral argument scheduled for February 02, 2010, in all of these cases are VACATED and the requests for evidentiary hearings and argument are DENIED. Defendants' Motion to Continue and Request for Stay of Court Proceedings are DENIED. These cases are taken Under Advisement this date.

C. 11:30 a.m. In State v. Hector Velasquez, CR2009-007679-003, after the Court issued its January 13, 2010, order, both sides filed prehearing statements. The State filed its standard prehearing statement indicating that it was calling no witnesses except perhaps those in rebuttal. The defendant filed a statement revealing that no witnesses would be called.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

Defendant also submitted a list of various documents similar, but not identical, to other lists that have been provided, with one pertinent addition, an affidavit from defendant himself. That affidavit has not been provided to the Court, and therefore the Court does not know what Mr. Velasquez has said. The Court will give defense counsel an opportunity to submit that affidavit to this Court, but otherwise the Court sees no occasion for an evidentiary hearing and no purpose for oral argument. Therefore, the hearing set in this matter for February 02, 2010, is VACATED. Defendant shall have until and including Tuesday, February 09, 2010, to submit a copy of the affidavit to this Court, following the e-mail order previously made. The State shall have until and including Tuesday, February 16, 2010, within which it may file any materials in response to that affidavit, again following this Court's order on e-mail delivery. The Court will take this matter Under Advisement on **WEDNESDAY, FEBRUARY 17, 2010**.

In State v. Joseph P. Doku, CR2009-121112-001, the posture of the case is the same as in the Velasquez case. No witnesses are listed by either side, and the only thing unique about defendant's list of witnesses is a reference to an affidavit from Joseph Doku. Following the pattern set in the discussion of the Velasquez case above, the Court hereby ORDERS that defense counsel shall have until and including Tuesday, February 09, 2010, within which to provide by e-mail, as previously ordered, Mr. Doku's affidavit, and the State shall have until and including Tuesday, February 16, 2010, to provide this Court, by e-mail as previously ordered, any responsive materials. The Court will take Mr. Doku's motion Under Advisement on **WEDNESDAY, FEBRUARY 17, 2010**.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

In State v. Noel Thomas, CR2008-007521-002, following this Court's order of January 13, the State filed its standard prehearing statement described above. The defense filed a Prehearing Statement and Motion to Expand Time Allotted for Hearing, in which defendant listed four Maricopa County judicial administrative assistants. The discussion above regarding State v. Justin Lunsford, CR2008-007842-001, is applicable here. For the reasons stated, this defendant shall be allowed an evidentiary hearing, with oral argument to follow. It will be set at the same time and on the same date as the hearing on Mr. Lunsford, because the four JAs listed by Defendant Thomas are on the list of Defendant Lunsford's five JAs. Accordingly, this defendant's Motion to Expand Time Allotted for Hearing is GRANTED. The hearing set for February 02, 2010, is VACATED, and RESCHEDULED for **MONDAY, MARCH 01, 2010, AT 10:30 A.M.**

D. 1:00 p.m. In State v. Bernabe Jimenez, CR2009-163230-001 and State v. Luis Alberto Jimenez-Ochoa, CR2009-163230-003, the two defendants filed a joint Motion to Disqualify the County Attorney's Office, to which the State has responded. In each, following this Court's order of January 13, the State has filed its standard prehearing statement which lists no witnesses. This Court has not received a prehearing statement from defendant in either case. Thus, it appears, the defense similarly has no witnesses to call and apparently no exhibits to offer except those attached to the original motion.

Accordingly, it is hereby ORDERED that the hearing as to these cases of February 02, 2010, is VACATED. These cases are taken Under Advisement as of this date.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

In State v. Michael James Marin, CR2009-154846-001, the State filed its standard prehearing statement listing no witnesses, except perhaps those in rebuttal. The defense filed a Prehearing Statement and Motion to Continue, listing unknown judicial assistants as well as “any and all witnesses listed by any other defendant who is a party to this litigation.” With regard to the statement concerning judicial assistants, the Court will work under the assumption that these are the same persons as referred to in the defense prehearing statement in State v. Justin Lunsford, CR2008-007842-001, discussed above. The statement that defendant intends to call any and all other witnesses listed by anybody else is so vague as to constitute non-disclosure. Defendants’ motion to disqualify shall therefore be heard in the same way and at the same time as the hearing involving Mr. Lunsford. Specifically, it is hereby SET for **MONDAY, MARCH 01, 2010, AT 10:30 A.M.** The hearing as to this case of February 02, 2010, is VACATED.

State v. Gilbert Martinez Sr., CR2006-007790-001, is in the same posture as Marin, and will be handled the same way. Specifically, an evidentiary hearing with oral argument to follow is GRANTED and is hereby SET to occur on **MONDAY, MARCH 01, 2010, AT 10:30 A.M.** As noted above with regard to Mr. Marin’s case, the only persons properly disclosed as witnesses are the relevant judicial administrative assistants. The Court does not recognize the reference to “any and all witnesses listed by any other defendant who is a party to this litigation” to constitute disclosure of anything.

E. 1:30 p.m. In State v. Kenneth D. Williams, CR2009-175039-001, and State v. Nashawn L. Campbell, CR2009-137382-001, after this Court’s order of January 13, the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

State filed its standard form prehearing statement listing no witnesses except possibly those in rebuttal. In each of these two cases, the defense filed a prehearing statement listing eight witnesses. Without ruling on whether each and every witness would be allowed to testify at the hearing, the Court notes that at least some of them may be. Accordingly, it is hereby ORDERED as to these two cases that the hearing of February 02, 2010, is VACATED, the requests for evidentiary hearing and oral argument are GRANTED, and hearings are SET to occur on both cases at the same time on **TUESDAY, MARCH 02, 2010, AT 1:00 P.M.**

In State v. Matthew Frank McEvoy, CR2007-120787-001, and State v. Joe Saucedo Gallegos, CR2008-180135-001, each defendant has filed a list of witnesses, including not only the JAs referred to in other cases, but also a few others. Without commenting on whether all of such witnesses would be permitted to testify, it is apparent that an evidentiary hearing would be appropriate, with oral argument to follow. It is therefore ORDERED setting these matters for an Evidentiary Hearing on **MONDAY, MARCH 01, 2010, AT 1:00 P.M.** Thus, in each case, the defendant's Motion to Continue is GRANTED, and the hearing set for February 02, 2010, is VACATED.

In State v. Eric Boyston, CR2004-007442-001, although the State filed its form prehearing statement listing no witnesses other than those who may be called in rebuttal, the defendant did not file any such prehearing statement. At least, none has been submitted to this Court in accordance with the Court's order of January 13, and none has been located by this Court's JAA. This Court therefore CONCLUDES that the defendant does not wish to call any

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

witnesses nor present any documents. Accordingly, the hearing in this matter set for February 02, 2010, is VACATED. The requests for an evidentiary hearing and oral argument are DENIED. The matter is taken Under Advisement this date.

F. 2:00 p.m. In State v. Jeffrey Burke, CR2006-048884-001, and State v. Rosalva Trevino, CR2004-008340-001, an evidentiary hearing shall be held, and so the request for the same is GRANTED. The request for argument thereafter is also GRANTED. The hearing set for February 02, 2010, is VACATED, and the hearing on these two cases is set for **TUESDAY, MARCH 02, 2010, AT 9:30 A.M.** The defendant's Motion to Consolidate a Portion of Evidentiary Hearing with Those of Similarly Situated Capital Movants, etc., is GRANTED, to the extent of consolidating these two cases, which from this Court's review seem to be the similarly situated capital cases that this Court has received.

In State v. Michael DeRosa, CR2008-156564-001, defense has filed a prehearing statement and Motion to Continue to Another Date. It may be that the testimony as outlined of the one witness, defendant himself, may be relevant, and so the Motion to Continue to Another Date is GRANTED, the request for an evidentiary hearing is GRANTED, and the hearing is set for **TUESDAY, MARCH 02, 2010, AT 9:00 A.M.** The hearing currently set for February 02, 2010, is VACATED.

In State v. Arthur L. Vitasek, CR2005-030514-001, the defendant, who represents himself, has not filed a prehearing statement, and thus evidently does not wish to call any witnesses. The hearing in this case set for February 02, 2010, is VACATED, any request for

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

evidentiary hearing and oral argument is DENIED, and the matter taken Under Advisement this date.

In State v. Eric Vargas Valenzuela, CR2009-130634-002 and CR2009-007438-001 (two separate files), the defense has not filed a prehearing statement, and thus has not disclosed any witnesses. Accordingly, the hearing of February 02, 2010, is VACATED, any request for evidentiary hearing and oral argument is DENIED, and these cases are taken Under Advisement this date.

G. 2:30 p.m. In State v. Johnathan Burns, CR2007-106833-001, the defendant filed a Notice of Exhibits and Witnesses Regarding Motion to Disqualify. The defendant stated that he “intends to call an undetermined expert witness in the area of ethics and will disclose such expert as soon as that expert is determined. Expert testimony is expected to take one hour.” The defense also asks this Court to “take judicial notice of any witnesses testifying for defendants in the hearings being held by this court regarding motions to disqualify MCAO.” These statements are not in substantial compliance with this Court’s order of January 13, and are the equivalent of no disclosure. Accordingly, the hearing set for February 02, 2010, is VACATED, the request for an evidentiary hearing and oral argument is DENIED, and the matter taken Under Advisement this date.

In State v. Brandon Kent Henderson, CR2003-022049-001, the posture of the case is the same as in State v. Johnathan Burns, and will be treated the same way. Accordingly, the hearing

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

set for February 02, 2010, is VACATED, the request for evidentiary hearing and oral argument is DENIED, and the matter taken Under Advisement this date.

In State v. Jeffrey Richard Martinson, CR2004-124662-001, the witnesses listed by the defense are four of the five JAs referred to in the Lunsford case discussed above. It is appropriate to handle that case in the same way as Lunsford and others similarly situated. Therefore, the defendant's Motion to Expand Time Allotted for Hearing is GRANTED. The request for evidentiary hearing is GRANTED. The hearing now set for February 02, 2010, is VACATED, and the matter RESET for **MONDAY, MARCH 01, 2010, AT 10:30 A.M.**

In State v. Allison Brooks, CR2009-122158-001, the Court has not received a prehearing statement from the defense. Thus, the defendant is not asking to present any evidence. The State's prehearing statement says it does not seek to present evidence. Therefore, the hearing now set for February 02, 2010, on this matter is VACATED. The request for an evidentiary hearing with argument is DENIED, and the matter is taken Under Advisement this date.

The Court believes that it has ruled on all cases set for hearing on Motions to Disqualify the Maricopa County Attorney's Office for February 02, 2010. If there were any other hearings set on that date before this Court, but not specifically referred to above, they are VACATED.

It is FURTHER ORDERED that the State's Motion to Vacate Oral Argument and Evidentiary Hearing set for February 02, 2010 and for an Expedited Ruling on all Motions to Disqualify MCAO for an Alleged Conflict of Interest Without Argument, a motion common to all of these cases, is DENIED AS MOOT. The State's Alternative Motion to Require Parties to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-163230-001 DT

02/01/2010

Appoint One Attorney to Argue the Issue of Agency Disqualification is DENIED. Those defendants for whom hearings have been scheduled are free to select one attorney to act for all. The State is similarly free to select one attorney to represent the State's interests in all hearings.